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**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MKB/168222

PRELIMINARY RECITALS

Pursuant to a petition filed July 22, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau in regard to Medical Assistance, a hearing was held on September 10, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly denied the Petitioner's Katie Beckett application on the grounds that she is not disabled.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: No Appearance

Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. On April 27, 2015, an application for the Katie Beckett Program was submitted on behalf of the Petitioner by her parents. It was reported that the Petitioner suffered a stroke in infancy causing

left side brain damage. Petitioner has been diagnosed with hemiplegic cerebral palsy with limitations in the use of her right arm and hand. It was also reported that Petitioner has hip and leg weakness on the right side, difficulties with chewing and speech delays. Petitioner receives speech therapy, physical therapy and occupational therapy.

3. On April 7, 2015, an occupational therapy evaluation was completed for the Petitioner. The therapist reported that Petitioner has greatly decreased use of her right upper extremity, diminished AROM and strength as well as minimal functional use. She noted a decreased ability to complete midline tasks and delays in fine and visual motor skills with her dominant left upper extremity. She also reported that the Petitioner has decreased ADL skills and minimal sensory defensiveness to tactile stimuli to the right upper extremity.
4. On April 15, 2015, a speech and language evaluation report was completed for the Petitioner. The therapist reported that the Petitioner's receptive language skills were at the 12 – 16 month level. Expressive language skills were found to be at the 9 – 12 month level. The therapist noted that the Petitioner did not imitate any early speech sounds. The therapist reported that all oral structures appeared adequate in terms of size, shapes and symmetry for speech sound production and feeding/swallowing. The Petitioner was observed to eat crackers but demonstrated decreased mastication skills. She drooled consistently from the right side of her mouth. The therapist diagnosed a mixed language disorder and oral dysphagia.
5. On April 20, 2015, a physical therapy evaluation was completed for the Petitioner. She was diagnosed with muscle weakness of the right arm, abnormality of gait, lack of normal physiological development and muscle weakness of trunk and lower extremity. The therapist reported that the Petitioner demonstrated a 19 month gross motor age equivalent at a chronological age of 22 months. Object manipulation was reported to be in the 2nd percentile. Overall gross motor was reported to be in the 5th percentile.
6. On May 20, 2015, Petitioner had an occupational therapy evaluation at Curative Care Network. She was noted to have a 17% delay in grasping and 26% delay in visual motor skills. It was reported that all functional skills were completed with her left hand. She was noted to have slightly decreased range of motion, strength and tone in right upper extremity. Petitioner was reported to walk forward and backward, bear weight through right upper extremity, use both hands together at midline to hold a container, open hand and extend arm with increased effort, clap. She was reported to be able to finger feed and is beginning to use a fork and spoon. She drinks from a bottle but not from a sippy cup or straw. She has difficulty with lip closure and drools excessively. She is reported to assist during dressing but is dependent on caregivers for all other ADLs.
7. On May 26, 2015, Petitioner had a physical therapy evaluation at Curative Care Network. Petitioner was evaluated as having a gross motor age equivalent of 20 months (chronological age of 23 months) which was a 13% delay. She was noted to creep and attain standing without support of hands, roll to prone with rotation and attain sitting, sit erectly, walk and run safely, climb up steps and down with hand on rail with minimal assist, walk sideways, jump, stand on one leg. She was noted to have decreased strength in hips and knees and decreased protective responses on the right side.
8. On May 28, 2015, Petitioner had an evaluation at Children's Hospital. It was noted that she has 15-20 spontaneous words in English and Mandarin and that she uses 2 signs. An MRI was assessed and it is noted that findings are consistent with an old stroke. She was noted to be alert, active, playful and social, waving hi and bye, giving high-fives, clapping. She was noted to have decreased tone in her right arm. She was also noted to climb, walk and run in a broad-based, slightly hemiplegic fashion.

9. On June 10, 2015, the Petitioner was evaluated at Children's Hospital. She was reported to be improving with feeding and increasing food textures. She was noted to continue to have fine motor and communication delays.
10. On June 11, 2015, the Petitioner was evaluated at Children's Hospital. She was reported to be walking independently, kicking a ball, running, climbing, swimming. Balance was noted to be improving and she sits well in all positions. She was reported to use her left arm more than her right but she is using her right hand more. She was reported to use 25 words spontaneously and repeat more. She was noted to have full ROM in all extremities. She was assessed as having mild impairments in age-appropriate abilities in mobility, fine motor skills, cognition and communication but has made significant improvements in these areas with therapy. A mild tightness was noted in her right arm-elbow flexors and forearm supinators.
11. On July 7, 2015, the Petitioner's case was evaluated by an agency physician. She determined that the Petitioner's impairment or combination of impairments is severe but does not meet, medically equal or functionally equal the listings. She found that the Petitioner's functional limitations are less than marked for acquiring and using information and marked for moving about and manipulating objects. She found Petitioner has no functional limitations in caring for self, health and physical well-being, attending and completing tasks or interacting and relating with others.
12. On July 8, 2015, the agency issued a notice to the Petitioner and her parents that it had determined the Petitioner does not qualify for MA Disability.
13. On July 22, 2015, a reconsideration request was filed. No new medical issues or conditions were reported.
14. On August 7, 2015, the Petitioner was evaluated by Health Reach. It noted an ongoing goal of improving oral motor skills for feeding. With regard to a goal to improve expressive language skills, it was reported that the Petitioner did not imitate any speech sound patterns in vocal play, imitated 1/5 animal sounds, tolerated H-O-H for signs for "more" and independently used a sign for "all done" when promoted. It was also noted that she followed 2-step related directions with 60% accuracy. She could not identify any body parts on self.
15. On August 13, 2015, the Petitioner's case was evaluated by another agency physician. She determined that the Petitioner's impairment or combination of impairments is severe but does not meet, medically equal or functionally equal the listings. She found that the Petitioner's functional limitations are less than marked for acquiring and using information, less than marked for interacting and relating with others, less than marked for moving about and manipulating objects and less than marked for health and physical well-being. She also found no limitations in caring for self or attending and completing tasks.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting disabled children who would otherwise be institutionalized, to receive MA while living at home with their parents. Wis. Stat. §. 49.46(1)(d)4. The Department's Disability Determination Bureau is required to review Katie Beckett waiver applications in a five-step process.

The first step is to determine whether the child is age 18 or younger and disabled. When the applicant meets the first step, there are four other steps that must be met. If the child does not meet the first step, then the application fails. In this case, the agency determined that the Petitioner is not disabled.

To be found "disabled" at step one, a person must meet the definition of that term as it is used for SSI purposes. See, Wis. Stat. § 49.47(4). The applicable SSI disability standards are found in the Code of

Federal Regulations, Title 20, Part 416, Subpart I, and by reference Appendices 1 and 2, Subpart P, Part 404. For all MA-related purposes, including the Katie Beckett Program, a finding of disability must be in accordance with federal Social Security Disability Insurance Benefits (DIB) and/or Supplemental Security Income (SSI) standards. See, Wis. Stat. § 49.47(4)(a)4; see also, Katie Beckett Program Policies & Procedures Manual, Chapter III, pp. 16, 31.

Current Social Security regulations define a disabling impairment for children as follows:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet or medically or functionally equal the requirements of a listing in the Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter, or
- (2) Would result in a finding that you are disabled under §416.994a.

20 C.F.R. §416.911(b). The reference in §416.994a subsection (2) describes disability reviews for children found disabled under a prior law. Since the petitioner's disability began after the new law was passed, she must meet or equal a listing described in subsection (1).

The process for determining whether an individual meets this definition is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity," she is not disabled and the evaluation stops. The Petitioner in this case is two years old and she is not working, so she passes this step.

Second, physical and mental impairments are considered to determine whether the applicant has an impairment or combination of impairments considered severe. If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). In this case, the Petitioner was found by the DDB to have an impairment or combination of impairments that is severe.

The third step requires consideration of whether an applicant's impairment or combination of impairments meets or medically or functionally equals a listed disability. For this case, the following listings are pertinent to the Petitioner's impairments:

111.06 Motor dysfunction (Due to any neurological disorder) Persistent disorganization or deficit of motor function for age involving two extremities, which (despite prescribed therapy) interferes with age-appropriate major daily activities and results in disruption of:

A. Fine and gross movements; or

B. Gait and station.

111.07 Cerebral palsy with:

A. Motor dysfunction meeting the requirements of 101.02 or 111.06; or

B. Less severe motor dysfunction (but more than slight) and one of the following:

1. IQ of 70 or less; or

2. Seizure disorder, with at least one major motor seizure in the year prior to application; or
3. Significant interference with communication due to speech, hearing, or visual defect; or
4. Significant emotional disorder.

This is a close case, not only because of the Petitioner's various and complex needs but because of the relatively subjective standards of the listings noted above. Even the agency's physicians were unable to reach the same conclusions with regard to the Petitioner's limitations in receptive and expressive language and gross/fine motor skills. The Petitioner has certainly made significant improvements in physical, occupation and speech therapy over the past several months. However, she does have a diagnosis of CP with gross and fine motor dysfunction and interference with communication due to a speech defect.

At the hearing, the Petitioner's mother testified that the Petitioner's entire right side continues to be affected. She has difficulty with drinking and eating. Chewing and swallowing continue to be an issue and there is an increased risk of choking. Speech development continues to be delayed though it is improving. Her mother testified that her receptive language is much better than expressive language. At the time of the hearing, the Petitioner is able to use 25 words but cannot string two words together. She is able to repeat words but cannot remember words. Fine and gross motor skills continue to be affected, especially on her right side. While gross motor skills have improved significantly, her mother testified that the Petitioner's gait is still unequal which makes falls a risk. She indicated a concern with regard to the Petitioner's safety with falls, as the Petitioner is unable to protect herself with her right arm if she falls. In addition, fine motor skills on the right side continue to be affected significantly.

The testimony of Petitioner's mother is supported by the medical records. Again, I note that while there is significant improvement as a result of therapy, the Petitioner continues to have issues with gross and fine motor skills as well as speech as a result of CP and a stroke. And again, the standards in the listings above are somewhat subjective, i.e. "disruption of" gross and fine movements, "significant" interference with communication. Based on the records and the testimony, I am concluding that she does meet or functionally equal the listings above. It is my understanding that there is an annual review of Katie Beckett eligibility and it may be that Petitioner will have improved to a point that she will no longer meet the listings. At this time, however, I conclude that there is sufficient evidence to demonstrate that she meets the listing and I find that the agency should find that she is disabled.

As noted at the beginning of this discussion, there is a several step process in determining eligibility for the Katie Beckett program. Step one is a determination of disability. Because the agency determined the Petitioner is not disabled, the remaining steps for an eligibility determination were not completed. Because I am concluding that the Petitioner is disabled, the case is now remanded to the agency to complete the eligibility determination.

CONCLUSIONS OF LAW

The Petitioner meets or functionally equals listings and is, therefore, disabled.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to continue the eligibility determination for the Petitioner for the Katie Beckett program based on a finding that the Petitioner meets the criteria in step one of being disabled.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

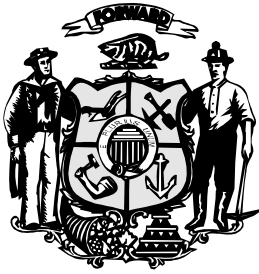
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 3rd day of November, 2015

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 3, 2015.

Milwaukee Enrollment Services
Bureau of Long-Term Support
Division of Health Care Access and Accountability